

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

J.D. DENNIS, SR.,	:	
	:	C.A. No. 05A-12-005 WLW
Appellant,	:	
	:	
v.	:	
	:	
DELAWARE HARNESS RACING	:	
COMMISSION,	:	
	:	
Appellee.	:	

Submitted: May 9, 2006
Decided: August 22, 2006

ORDER

Upon Appeal of a Decision of the
Delaware Harness Racing Commission. Denied.

Joseph A. Hurley, Esquire of Joseph A. Hurley, P.A., Wilmington, Delaware;
attorneys for the Appellant.

Patricia D. Murphy, Esquire, Department of Justice, Wilmington, Delaware; attorneys
for the Appellee.

WITHAM, R.J.

Dennis v. Delaware Harness Racing Comm.

C.A. No. 05A-12-005 WLW

August 22, 2006

Appellant, J.D. Dennis, Sr. (Mr. Dennis), filed an appeal with this Court seeking review of a decision issued by Appellee, the Delaware Harness Racing Commission (the “Commission”). In its decision, the Commission concluded that Mr. Dennis violated Rule 8.5.2¹ on October 3, 2005, when the horse that he trains and owns, Heartease, tested positive for blood gas levels in excess of the permissible levels established by the Commission. Consequently, the Commission imposed a \$3,000.00 fine.² The Commission relied on Rule 8.9.16, which provides:

With respect to a finding of a prohibited level of carbon dioxide in a blood sample obtained from a prerace blood gas analyzer test result, there shall be no right to testing of the "secondary sample" by the licensee, provided that a "secondary sample" shall be transported to the designated Commission laboratory on an anonymous basis for confirmatory testing. In the event that the initial blood gas analyzer test result is confirmed by the test result of the official Commission laboratory, such test results shall be *prima facie* evidence that the prohibited drug was present in the horse at the time it was scheduled to participate in a race and is *prima facie* evidence.

The salient facts are as follows: On October 3, 2005, Heartease was selected for a pre-race blood gas analyzer test. The veterinarian, Dr. Kim Fincher (“Dr.

¹Rule 8.5.2 states, “[a] trainer shall prevent the administration of any drug or medication or other foreign substance that may cause a violation of these rules.”

²Notably, the Commission decided to deviate from the minimum penalty recommended in 8.3.2.2 because it concluded that “extraordinary circumstances” existed. 8.3.2.2 reads, “in the absence of extraordinary circumstances, a minimum license revocation of nine months and a minimum fine of \$3,000, and a maximum fine of up to the amount of the purse money for the race in which the violation occurred, forfeiture of the purse money, and assessment for cost of the drug testing.”

Dennis v. Delaware Harness Racing Comm.

C.A. No. 05A-12-005 WLW

August 22, 2006

Fincher”), testified that she drew two vials of blood from Heartease, which were taken to the lab where Rick Carroll (“Mr. Carroll”) runs the testing machine, a Radiometer ABL 700 series. The first test run on Heartease’s primary sample resulted in a blood gas reading of 12.7. The permissible blood gas level is 12.4. Thus, the primary sample was retested, but this time Mr. Carroll re-calibrated the machine to account for Heartease’s temperature. The second test resulted in a blood gas reading of 12.8. Based on these two blood gas level readings, the secondary sample was packed and sent to the New Bolton Center for confirmation. In the interim, Heartease was scratched from his race. When Dr. Soma sent the secondary sample results to John Wayne, the Executive Director of the Delaware Thoroughbred Racing Commission, he indicated that the blood gas level was 12.5 and attached a note that read, “The elevated oxygen tension (pO₂) suggests contamination of sample with room air during collection.” However, when re-called, Dr. Fincher testified that she collected the blood sample using a vacuum tube, which contains no air.

Mr. Dennis also provided character witnesses, who testified that he has a reputation for honesty in the field of racing.³ In fact, Mr. Dennis has been a licensed horseman in Delaware for forty-five years and has never had an infraction or been accused of a high reading.

³One of Mr. Dennis’ character witnesses was Robert Collison, the inspector for the Department of Agriculture, working with the Harness Racing Commission, who conducted the investigation into Mr. Dennis. His other character witness was Hugh Gallagher, the Administrator of Racing for the Harness Racing Commission. Both witnesses have known Mr. Dennis for approximately thirty years and believe that his reputation for honesty and integrity in the field of racing is good.

Based on Mr. Dennis' history of forty-five infraction-free years of racing, his character witnesses, and Dr. Soma's note, the Commission determined that "extraordinary circumstances" were present and, consequently, deviated from the minimum recommended penalty. Mr. Dennis now appeals the \$3,000.00 fine.

For the reasons set forth below, Mr. Dennis' appeal from the decision of the Commission is *denied*.

Standard of Review

This Court reviews a Commission's decision to determine whether the factual findings are supported by substantial evidence and are free from legal error.⁴ Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁵ The Commission's decision will be affirmed if there is no abuse of discretion.⁶ "When reviewing an administrative agency's interpretation of regulatory provisions, this Court will defer to the construction placed by the administrative agency on regulations promulgated and enforced by it, unless shown to be clearly erroneous."⁷

Discussion

Mr. Dennis made two arguments in support of his appeal. The first was that

⁴*Hochstetler v. Delaware Harness Racing Comm'n*, 2003 Del. Super. LEXIS 68, at *5.

⁵*Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Federal Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

⁶*Hochstetler*, 2003 Del. Super. LEXIS 68, at *5.

⁷*Id.*

Dennis v. Delaware Harness Racing Comm.

C.A. No. 05A-12-005 WLW

August 22, 2006

the Commission's decision regarding whether a prohibited substance was administered to Heartease was not supported by substantial evidence. The second contention was that the Commission failed to properly apply its Rules in determining whether to admit the blood gas results into evidence.

The State's rebuttal was that the Commission's decision was supported by substantial evidence based on Rule 8.9.16. The State also asserts that the Commission is entitled to substantial deference in interpreting its own Rules.

Mr. Dennis' first argument consists of two sub-arguments, namely, that the uncertainty of the margin of error and the possibility of contamination mentioned in Dr. Soma's note prohibit the finding of substantial evidence to support the Commission's decision. The State counters Mr. Dennis' argument by pointing out that Delaware courts have consistently denied the admissibility of margin of error evidence when the statute specifically addresses the margin of error. Also, the State contends that Mr. Dennis cannot point to any evidence on the record that the secondary sample was contaminated, or what effect such contamination might have on the result.

As for the blood gas results, Mr. Dennis' argument that the Commission's decision could not be supported by substantial evidence because of the speculation as to the margin of error is defeated by Rule 8.9.15.1, which states:

Under this alternative protocol, the prohibitive Base Excess concentrations are as follows: Base Excess level of 10.0 mmol/l (mEq/l) or higher for non-furosemide (Lasix) treated horses and Base Excess (BE) level of 12.0 mmol/l (mEq/l) or higher for furosemide (Lasix)

treated horse. **The level of uncertainty will be included before it is considered a violation of these Rules. The level of uncertainty is 0.4 mmol/l (mEq/l) and a positive test report must include this level of uncertainty.** A horse must show a Base Excess (BE) level of 10.4 mmol/l (mEq/l) or higher for non-furosemide (Lasix) treated horse and Base Excess (BE) level of 12.4 mmol/l (mEq/l) or higher for furosemide (Lasix) treated horse, in order for a violation to be reported under this Rule. (emphasis added).

Rule 8.9.15.1 clearly permits a margin of error of 0.4. Thus, Heartease's blood gas levels of 12.7, 12.8 and 12.5 qualify as a violation. As for the disparity in the results, Mr. Dennis provides no evidence that a disparity is either unusual or problematic. In fact, it is the impression of this Court, based on prior appeals from the Commission, that disparity between the three blood gas level tests is not uncommon. The rule provides for a reasonable degree of uncertainty. Therefore, this argument is unsuccessful.

Mr. Dennis' contention regarding contamination also fails. First, Dr. Soma's note says that the results suggest contamination, but no evidence was presented by Mr. Dennis to show that contamination did occur. Moreover, the State presented evidence, by way of Dr. Fincher's testimony that she used a vacuum tube to obtain the blood samples, that air contamination did not occur.

Thus, the Commission was permitted to rely on the results of all three blood gas level tests in its application of Rule 8.9.16. As such, *prima facie* evidence exists that a prohibited substance was present in Heartease prior to the race and the Commission's decision was supported by substantial evidence.

Dennis v. Delaware Harness Racing Comm.

C.A. No. 05A-12-005 WLW

August 22, 2006

Mr. Dennis' second argument was that the Commission erred when it interpreted Rule 8.9.15.2.1, which requires that if the test results in a high blood gas level, "the horse in question shall be immediately retested." Mr. Dennis contends that this language mandates that another blood sample be taken. However, the State argues that deference should be given to the Commission's interpretation of the Rule. The Commission opined:

It has long been the policy at the tracks that if the primary sample tested high, the sample would be retested and if it again came back high, the secondary sample would be sent to New Bolton Center for confirmation. Commission veterinarians do not return to the horse to obtain a second blood sample. The Commission's concern has been that if a trainer is left alone with a horse who has had his first blood sample taken, and that blood sample tests high for CO₂, the trainer will then have an opportunity to inject the horse with some agent to counteract the high CO₂ reading.

As previously mentioned, this Court will defer to the interpretation of the Commission regarding its Rules, unless such an interpretation is clearly erroneous. In the case *sub judice*, I am unconvinced that the Commission's interpretation is clearly erroneous. First, the Commission's concern regarding a trainer counteracting the high CO₂ reading is understandable. Second, the Commission mentioned that this has long been the policy at the tracks. Third, the State of Delaware's website now reflects the language of this Rule to read, "the primary blood sample of the horse in

Dennis v. Delaware Harness Racing Comm.

C.A. No. 05A-12-005 WLW

August 22, 2006

question shall be immediately retested.”⁸ Thus, it was evidently the intention of the Commission to only require the primary sample to be retested, which is supported by the long-standing policy at the tracks to only retest the first sample, not draw another blood sample from the horse. So, this Court will defer to the Commission’s interpretation of Rule 8.9.15.2.1.

Based on the foregoing, Mr. Dennis’ appeal from the decision of the Commission is *denied*. IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R.J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

⁸See <http://www.state.de.us/research/AdminCode/title3/500/501/501-07.shtml#TopOfPage>. It should also be noted that on the website, the Rule number is 8.9.14.2.1.